IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 391, 392, 393.

CALMAN COOPER, HARRY A. STEIN and NATHAN WISSNER,

Petitioners,

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK

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# INDEX



## CASES CITED



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### I

### Chronological summary of detention of petitioners Cooper and Stein prepared at the request of the Court.

#### A.

#### Chronology as to the Detention of Petitioner, Cooper:

*1950*

June 5—9:15 A.M. Cooper arrested in New York City (1310), on signal from witness Jepeson identifying Cooper as man who had rented truck used in the hold-up (778, 788-789).*

* Numbers in parentheses refer to the pages in the certified Record on Appeal to the New York Court of Appeals.

*1950*

| | |
|---|---|
| June 5—2 P.M. | Cooper arrives at State Police Headquarters, Hawthorne, Westchester County, New York (1311-1312). Fingerprints and pedigree taken (1391-1393). |
| June 5—3 P.M. to 5 P.M. | Mrs. Anna Klaus, Civilian Stenographer, present with Cooper and three State Police officers (1573-1574). They did not question Cooper (1393). |
| June 5—5:30 P.M. | Cooper has supper (1388-1392). |
| June 5—8 P.M. to 1 A.M. | Cooper questioned by Sergeants Barber and Sayers and Trooper Buon, State Police Officers (1312; 1395; 2101; 2073-2077). Not a hand was laid on Cooper during this time (2074; 2081). Sergeants Barber and Sayers and Trooper Buon all left Cooper at or before 1 A. M. on June 6 (2074; 2077; 2101). |
| June 5—12 P.M. | Captain Glasheen of State Police brings the civilian witness, Percy Brassett (2053) before Cooper. Brassett then identified Cooper (2002-2003). Captain Glasheen did not question Cooper at this time (2003). |
| June 6—1 A.M. | Cooper left in the custody of one trooper (2078). |
| June 6—1 A.M. to 8 A.M. | Cooper sleeps or rests (1413).<br><br>(N.B.: This period of questioning has been put down according to the witness for the People who gave the latest time of the termination of this questioning, *i. e.*, witness Barber at page 2077. However, the other witnesses all stated that the questioning terminated around midnight. Hess said that he left and brought in the mattress just after midnight (1395- |

1950

| | |
|---|---|
| | 1396), and Trooper Leon, who relieved him on guard duty at midnight, said that the mattress was brought in for Cooper a little after midnight (1421). Buon said the questioning ended at midnight (2101) and Sayers said that he stayed with Cooper until about 12:30 A. M. (1312).) |
| June 6— | Cooper received the same meals at breakfast, luncheon and dinner as the State Police (1389; 1393; 1413-1414). |
| June 6—10 A.M. to 6 P.M. | Cooper questioned by same three State Police Officers (1403-1404; 2103). This questioning was interrupted for luncheon and dinner (1389). Sergeant Sayers left at noon (1313). |
| June 6—6 P.M. | Cooper initiates proposal to confess (2115-2116). |
| June 6—6:30 P.M. to 7 P.M. | Cooper advises Sergeant Sayers he will confess if brother Morris Cooper can be released from Parole violation, and asks to see someone from the Parole Board (1313-1315). |
| June 6—8 P.M. | District Supervisor John Reardon of State Parole Commission comes to see Cooper as requested and discusses with Cooper necessity for action by a Parole Commissioner (1446-1449). |
| June 6—10 P.M. | Cooper makes oral admissions of guilt to New York State Parole Commissioner Donovan in the presence of District Supervisor Reardon of the Parole Commission (1450-1453, incl.). Cooper did not complain of any threats or violence to these officials (1454). |
| June 7—1:30 A.M. to 2 A.M. | Typewriting of formal confession of Cooper completed (1461). *Cf.*, People's Exhibit 59, page 2874. |

**Summary**

The petitioner Cooper was in custody at State Police Headquarters for 32 hours prior to oral admissions of guilt to State Parole Commissioner Donovan. He was questioned for a maximum of 12 hours, allowing a half hour for each of two meals, on two separate occasions.

**B.**

**Chronology as to the Detention of Petitioner, Stein:**

*1950*

June 6—2 A.M. Trooper Crowley of the New York State Police testified that at this time Petitioner, Harry A. Stein, was arrested at the home of his brother, Lou Stein, at 234 East 3rd Street, in the Borough of Manhattan, City of New York. He and Corporal Sweeney of the New York State Police took part in the arrest and also Detective Mulligan of the New York City Police Department (1685).

At this time, Detective Mulligan told petitioner, Harry A. Stein, in the presence of his brother, Lou Stein, that "you are wanted by the State Police in the Reader's Digest case". Lou Stein was not arrested (1959).

Crowley also testified that Mulligan told petitioner, Stein, where he was going (1696-1697) in the presence of his brother, Lou.

Detective Mulligan further testified (1960) that he told petitioner, Harry A. Stein, at this time: "You are wanted on the Reader's Digest case; these are state troopers". Harry

1950

Stein then said to his brother, Lou: "You get hold of John Duff and get ahold of somebody" (1960).

Detective Mulligan then told the petitioner, Stein, in the presence of his brother, Lou: "You are going to the State Police Barracks at Hawthorne, New York" (1960). It is significant that on June 7, 1950, John J. Duff, Esq., of counsel for petitioner, Stein, did commence legal proceedings for the release of Stein. Lou Stein had speedily communicated with John J. Duff, Esq., at 7:20 A. M. on June 6, some five hours after petitioner, Harry Stein, had been arrested (1828; 1832).

June 6—3-3:30 A.M. Petitioner, Harry A. Stein, arrived at the Hawthorne Headquarters of the New York State Police (1689), in the company of Troopers Crowley and Ford. Crowley went to bed in about 25 minutes and left Stein with Sergeant Kormandy (1691).

June 6—3 A.M. Captain Glasheen present at State Police Headquarters when Stein arrived (1910-1911; 1916).

June 6— After Stein's arrival at State Police Headquarters between 3 and 3:30 A. M. Corporal Brann and Trooper Pietrack were assigned by Captain Glasheen as alternating guards of Stein (1905; 1923).

(N.B.: Although Corporal Brann testified as a witness on the trial for the petitioner, Wissner (2372), and Trooper Pietrack testified as a witness for the People, and was cross-examined by counsel for the petitioner, Cooper (1098; 1101), neither

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# INDEX



## Table of Authorities Cited



## Statutes

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### STATEMENT

All of the petitioners seek a review of the judgment and decision of this Court handed down on June 15, 1953, affirming the unanimous judgments of the Court of Appeals of New York rendered on March 6, 1952 (303 N. Y. 856, 104 N. E. 2d, 917) which affirmed the judgments of the County Court of Westchester County, New York, entered on December 27, 1950, convicting all of the petitioners of the crime of murder in the first degree and sentencing all of the petitioners to death.

On October 13, 1952, this Court granted writs of certiorari to the Court of Appeals of New York in these cases *"limited to the question as to the admissibility of the confessions."* 344 U. S. 815; 97 L. Ed. (Advance, p. 32). (Emphasis supplied.)

The appeals of all of the petitioners were argued on December 18, 1952, and on June 15, 1953, the Chief Justice and Justices Reed, Jackson, Burton, Clark and Minton concurred in affirming the judgments of conviction as to all of the petitioners. (—— U. S. ——; 97 L. Ed. (Advance, p. 1007)).

## AS TO THE PETITIONS OF STEIN AND COOPER

Mr. Justice Jackson writing for the majority, disposed of these petitioners' contentions to the effect that their confessions admitting their participation in the felony murder of Andrew Petrini had been coerced. At page 19 of the majority opinion the Court held:

**I. "We cannot say that petitioners have been denied a fair hearing of the coercion charge."**

At page 26 as to alleged physical violence exerted upon petitioners, Stein and Cooper, the Court said:

**II. "We determine that the state court could properly find that the confessions were not obtained by physical force or threats."**

At pages 28 and 29, as to alleged psychological coercion exerted upon petitioners, Stein and Cooper, the majority held:

**III. "Both confessions were 'voluntary', in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion."**

At page 30, after reviewing the question of illegal detention, the Court held:

**IV. "From the foregoing considerations, we conclude that if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error."**

A perusal of the above extracts from the majority opinion in these cases should satisfy the most skeptical that this Court decided the sole question that it consented to hear, to wit, "the question as to the admissibility of the confessions." 344 U. S. 815. Of course, the petitioners are dissatisfied with the Court's ruling "that if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error." This finding cuts the ground from under the contentions of the petitioners Stein and Cooper. Indeed, these petitioners urged no other bases for the reversal of their convictions in their petitions and briefs for writs of certiorari other than the alleged extortion of their confessions admitting their guilt.

The learned Justices of this Court having consented to hear this sole question proposed by petitioners Stein and Cooper, and having decided it adversely to them, nothing is left to review. The Court has decided these cases on the sole question presented by these petitioners. No other question of due process is available to them.

The majority opinion, at pages 32-34, emphasizes this fact:

**V. "Here the evidence of guilt, consisting of direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained, is enough apart from the confessions so that it could not be held constitutionally or le-**

**gally insufficient to warrant the jury verdict. Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse it."**

Mr. Justice Jackson, speaking for the majority of the Justices at page 36 of his opinion, summed up the unanswerable argument to the complaints of the petitioners, Stein and Cooper, as follows:

VI. **"But, whatever may have been the grounds of the Court of Appeals, we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error. We have pointed out that it was not error if the jury admitted and relied on the confession and was not error if they rejected it and convicted on other evidence. To say that although there was no error in the trial an Appellate Court must reverse would require justification by more authority than we are able to discover."**

We pass over as unworthy of reply, the ten criticisms set forth at pages 3, 4 and 5 of the Stein and Cooper petition, such criticisms relating to fact statements contained in the majority opinion of the Court delivered by Mr. Justice Jackson. Whether, Waterbury, the driver of the Reader's Digest truck, released himself after being tied up by the petitioners Stein and Wissner after the murder of Andrew Petrini, or whether someone else released him has no bearing on the sole question before the Court, to wit, the admissibility of the confessions of Stein and Cooper. Neither does it matter whether two police officers or three arrested Cooper, or whether two or three alibi witnesses testified for Wissner.

At pages 5, 6 and 7 of the Stein and Cooper petition, great stress is laid upon the testimony of Trooper Crowley at page 1686 of the record that he did not notice anything abnormal about the arms of the petitioner, Stein, at the time of his arrest at 2 A. M. on June 6, 1950, at the apartment of his brother, Lou Stein. There is no proof in the record that Crowley examined Stein's arms or paid any particular attention to them at this time or any other time.

Most significantly, however, petitioners' counsel pass over in silence the fact that Lou Stein, the brother of petitioner, Stein, was not called as a witness on the trial as to the physical condition of Stein at the time of his arrest although Lou Stein was present at the time of the arrest (1958-1960). (Numerals in parentheses are page references to the certified Record on Appeal to the New York Court of Appeals unless otherwise indicated.) None of the three petitioners called any witnesses to testify as to their physical condition prior to their arrest. The wife of petitioner, Wissner, was with him at the time of his arrest, but she was not called to testify as to the physical condition of her husband just before his arrest nor was his daughter who testified as to an alleged alibi, which testimony was evidently rejected by the jury as incredible.

Moreover, the testimony of New York State Police Captain Glasheen to the effect that Wissner had injuries and had been receiving medical treatment prior to his arrest (2026) prompted a declaration by Wissner's trial counsel that he would produce medical records or X-rays to show that such treatment had nothing to do with the condition of Wissner at the time he arrived at the Westchester County Jail (2027). Very significantly, no such medical records or X-rays were ever produced by Wissner's astute trial counsel, nor were any medical experts

called by him to establish Wissner's injuries prior to his arrest.

Reverting for the moment, to the bruising of the left bicep area of Stein, which was the only evidence of injury found by Dr. Vosburgh on the morning after the arraignment (1737-1738) the doctor stated that such bruising could have been caused by the strong grip of a police officer at the time of Stein's arrest (1739-1740). Stein was fifty-two years of age at this time (1734 and 1739). What could be more sensible than for a police officer to take a strong grip upon a suspect being taken into custody on a murder charge? Crowley, the police officer, did not take part in the questioning of Stein prior to his confession (1091).

What is now to be said also by the long-experienced counsel for Stein, who admitted as a witness on the trial, that he knew Stein for nineteen years (1845) that he appeared in open Court in this case with Stein on June 16, 1950, when Stein entered a plea of not guilty to the murder indictment and yet he did not complain to the County Judge that Stein had been mistreated by any police officer nor did the petitioner, Stein, despite his previous record, himself complain to the County Judge? (1848). Nor did this resourceful attorney complain in Chambers during a conference with the County Judge, after the not guilty plea had been taken, that Stein had been mistreated, beaten or threatened (1849).

All this, despite the fact that this resourceful attorney who argued the Stein appeal before the Justice of this Court on December 18, 1952, had testified as a witness on the trial that he had visited Stein in the Westchester County Jail on June 9, 1950, one week before Stein's arraignment in open Court to plead to the murder indictment.

What is to be said by petitioner, Stein, as to this legal vacuum? Finally, counsel for Stein admitted, as a witness on the trial, that he did not know of his own knowledge when or where Stein sustained the bruises complained of (1850).

This disposes of the fallacious assertion at page 8 of the Stein-Cooper petition that "admitted injuries and bruises" were received by Stein between the time of his arrest and the time of his arraignment. There is no such proof in the record.

Although Trooper Crowley testified on two separate occasions during the trial (1684; 2382) and although he was one of the arresting officers of Stein, he was never examined by any of the trial counsel for any of the three petitioners concerning alleged mistreatment of any of the petitioners who were represented by three of the most skillful trial lawyers in the Metropolitan area of New York City.

While it is axiomatic that it is futile for defeated counsel to argue with a jury concerning its verdict on the facts, or as to credibility of witnesses, nevertheless, petitioners' counsel would, in effect, set themselves up as a reviewing body to challenge the guilty verdicts of the jury and to strike down the ruling of the trial Judge denying their motions for a new trial. Moreover, they denounce the unanimous affirmance of the convictions of all of the petitioners by the seven Judges of the New York Court of Appeals and they take exception to the affirmance of the New York Court of Appeals judgments by the majority of the Justices of this Court.

Petitioners' counsel also quarrel with Justice Jackson's comment on the failure of the petitioners to reveal their possible freedom from violence prior to their arrest. Of course, they had an absolute right to refuse to testify

if they felt that their prior criminal records would destroy their credibility. However, witnesses could have testified as to the physical condition of these petitioners prior to their arrest. Who decided that such witnesses should not be called and why were they not called on this issue?

While police officers, at page 10 of the Stein-Cooper brief, are laid open to an imputation of perjury, nevertheless, it is no gigantic fiction at variance with the facts of life, that police officers in New York State and in the other States of the Union lay down their lives week in and week out for our people. Members of the New York State Police have been murdered by desperate criminals while performing their duties and it is no myth that they take their lives in their hands every moment that they are on patrol.

On the other hand, the most naive student is well aware that hardened criminals, such as these three petitioners have no respect for life or property and will stop at nothing to achieve their nefarious purposes.

We must correct the erroneous statement at page 12 of the Stein-Cooper petition to the effect that the record shows no medical treatment of Wissner just prior to his arrest. The record shows just the opposite at pages 2026 to 2028 inclusive. Such information was furnished by no less a person that Wissner's brilliant trial counsel.

At page 16 of the Stein-Cooper petition, we find sorrowful complaint about the Court's comment on the "way of life" of all of the petitioners prior to their arrest in the cases at bar. With disarming effrontery, petitioners' counsel say there is nothing "*in or out of the record*" to suggest involvement of any of them in any violence prior to arrest. We remind the Court of the irrefutable evidence to the contrary during the six weeks' period prior to the murder of Andrew Petrini in the instant cases. The tes-

timony of the accomplice Dorfman, with no prior criminal record, buttressed by the testimony of Homishak, shows Cooper and Stein travelling around New York City and adjoining Westchester County with loaded pistols and revolvers at various times for some weeks prior to the Petrini murder; that Stein and Cooper approached Dorfman six weeks before the murder with suggestions to hold up the Reader's Digest truck, and that Cooper, Stein and Dorfman had "cased" the Reader's Digest area with the knowledge and consent of Wissner as pointed out by Mr. Justice Jackson at page 6 of his opinion.

Was this the way of life of a "carpenter", "an itinerant jewelry salesman" or one engaged in the "automobile rental business" as so benignly stated at pages 16 and 17 of the Stein-Cooper petition? What do the petitioners hope to gain by such statements? All of this, including the criminal records of all of the petitioners were before the New York Court of Appeals despite the protestation of petitioners to the contrary (100-101-102).

At page 18 of the Stein-Cooper petition the bald statement is made that this Court's ruling that the three petitioners were not inexperienced in the ways of crime is based on "matters dehors the record". The criminal records of the three petitioners printed at pages 100, 101 and 102 in the record contradict this statement.

Again we contradict the gratuitous statement at page 21 of the Stein-Cooper petition that as to Stein: "that between the time of his arrest and the time of his confession he sustained injuries of a manifest and substantial nature." No evidence appears anywhere in the record that Stein was injured after his arrest. This is also true as to Cooper and Wissner. (If the bruises in the left bicep area of Stein's arm were sustained at arrest or after, they were medically traceable, as has been discussed, to a grip

by an officer, who took him into custody and did not participate in the questioning.)

All of the petitioners failed at all times during the trial to convince the trial Judge that any physical or mental coercion had been exerted against them at any time. All of the petitioners failed to convince even one of the seven Judges of the New York Court of Appeals that the confessions of Stein or Cooper were the products of mental or physical duress. Otherwise, the verdicts of guilty would have been set aside by the trial Judge and by the Court of Appeals under the doctrines established in *People* v. *Crum*, 272 N. Y. 348; *People* v. *Valletutti*, 297 N. Y. 226, and *People* v. *Lewis*, 302 N. Y. 353, 98 N. E. (2d) 553.

In *People* v. *Valletutti*, 297 N. Y. 226, the Court of Appeals reversed the judgment of death because the Court felt that the defendant's confession had been coerced. At page 231 the Court reiterated its traditional stand on this issue:

> "Many a criminal record which comes to us contains a confession, and conflicting testimony as to whether or not the confession was extorted from the defendant. If there is a fair question of fact as to this, the jury's verdict is not interfered with. But a confession is not proof at all unless it be a free act. This court must see to it that a reasonable doubt on this score is resolved in favor of a defendant, and, in capital cases, we are commanded also to deal with the weight of evidence (*People* v. *Crum*, 272 N. Y. 348, 350)."

Also, in *People* v. *Lewis*, 302 N. Y. 353, 98 N. E. (2d) 553, the New York Court of Appeals reversed the judgment of death because the seven Judges unanimously found that the defendant's confession had been extorted through mental coercion. At 302 N. Y. 364 the Court emphasized that the admission in evidence of a coerced confession

will vitiate a verdict of conviction and also cited many decisions of The Supreme Court of the United States as authority for this proposition and said:

> "We have held that an involuntary confession is by its very nature evidence of nothing (*People* v. *Valletutti, supra*, p. 234). Moreover, our Federal Constitution (14th Amendt.) is a bar to the conviction of any individual in our courts of justice by means of a coerced confession (*Asheraft* v. *Tennessee, supra*). We have a like provision in section 6 of article I of our State Constitution. A denial of due process has been defined as the failure to 'observe that fundamental fairness essential to the very concept of justice. * * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt'. (*Lisenba* v. *California*, 314 U. S. 219, 236-237.) Not only is the use of a coerced confession in obtaining a verdict a violation of due process, but, if such confession is admitted in evidence, that is sufficient to void the conviction regardless of other evidence which might nevertheless demonstrate guilt (*Malinski* v. *New York*, 324 U. S. 401, see, Note, 93 L. Ed. 115; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Haley* v. *Ohio*, 332 U. S. 596; *Asheraft* v. *Tennessee, supra*; *Chambers* v. *Florida*, 309 U. S. 227).
>
> "We recognize that due process is not lacking where upon facts permitting different conclusions it is left for the jury, under a proper submission, to say whether or not there was coercion (*Malinski* v. *New York, supra*; *Lisenba* v. *California, supra*; *Lyons* v. *Oklahoma*, 322 U. S. 596)."

Under the doctrines of *People* v. *Valetutti* and *People* v. *Leyra, supra*, the Court of Appeals would necessarily have reversed the convictions in the cases at bar if the Court

found evidence that the confessions of Stein and Cooper had been coerced. The fact that the Court of Appeals unanimously affirmed the convictions should conclusively prove to the satisfaction of the most partisan that the Court of Appeals found no evidence in the record to show that either of the confessions had been coerced.

In *People* v. *Crum*, 272 N. Y. 348, the New York Court of Appeals emphasized that the seven Judges of this Court in a capital case are obliged to weigh the evidence and form a conclusion as to the facts.

Chief Judge Crane, at 272 N. Y., pages 349 and 350, said:

> "The Constitution of this State in Article VI, Section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This', said the court in *People* v. *Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did'. A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt."

We feel that the constitutional power granted to the Court of Appeals in capital cases by Article VI, Section 7, of the New York State Constitution should be emphasized here:

> "The jurisdiction of the Court of Appeals shall be limited to the review of questions of law except where the judgment is of death, * * *."

Section 528 of the New York Code of Criminal Procedure defines the powers of the Court of Appeals in capital cases as follows:

> "When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below."

It is obvious that in the instant cases the Court of Appeals did not order a new trial because the Court was satisfied that the verdicts were not "against the weight of the evidence or against law". Evidently the Court of Appeals did not feel "that justice requires a new trial".

After commenting upon this statutory grant of power to the Court of Appeals and pointing out that the review in the Court of Appeals "afforded petitioners a review with a latitude much wider than is permitted to us", Mr. Justice Jackson, writing for the majority of the Justices in the cases at bar, emphasized the extent of the review in the Supreme Court as follows, at page 14 of his opinion:

> "Although, even within this range, the Court of Appeals found no cause for upsetting this conviction, our review penetrates its judgment and searches the record in the trial court." (97 L. Ed. (Advance, p. 1017).)

The fact that this Court deliberated for six months after the argument before affirming the convictions in these cases indicates that this Court did penetrate the judgments of affirmance in the Court of Appeals and did search the record in the trial Court and was satisfied that there were no violations of due process.

Faulty reasoning in some quarters has given rise to the false impression that this Court has held that the convic-

tions in the cases at bar may be properly affirmed even though the confessions of Stein and Cooper were extorted, and were considered by the jury, provided that other sufficient independent evidence appears in the record to warrant the conviction of the petitioners. Counsel for the petitioners seem to share this erroneous notion.

We respectfully submit that this Court has made no such ruling. We urge that this Court has found that the Jury could properly decide that the confessions of Stein and Cooper were not coerced. Further, the Court has held that, even assuming that the Jury rejected the confessions as coerced, sufficient independent evidence appears in the record to justify the convictions of all of the petitioners and that the Jury was justified in convicting all of the defendants on such independent evidence.

We must assume that the Jury obeyed the instructions of the trial Judge at pages 2765, 2766 and 2767 of the record to the effect that they must disregard the entire statements of the petitioners, Stein and Cooper, if the Jury found that they were not freely and voluntarily made, or even if the Jury entertained a reasonable doubt on this issue.

It is fundamental law that an Appellate Court will assume that a trial jury will obey instructions of a trial Judge to disregard incompetent evidence. (*People* v. *Wilson*, 141 N. Y. 185 at 191; *Greenfield* v. *The People*, 85 N. Y. 75, 90, 91; *People* v. *Warder*, 231 N. Y. App. Div. 215, 247 N. Y. Supp. 60 at 66.) The unanimous opinion of the Appellate Division of the New York Supreme Court in the *Warder* case was written by Mr. Justice Finch, who later served with great distinction in the revered New York Court of Appeals.

Acceptance of any other fallacious theory that an American jury would disregard the careful and painstaking instructions of the trial Judge concerning the question

of the voluntariness of the Stein and Cooper confessions would result in a total destruction of the entire jury system. Under this reasoning, no jury verdict on the facts could ever be sustained, simply because disgruntled and disappointed criminals have been justly convicted.

The process by which the Court arrived at this opinion is in conformity with the method discussed by Mr. Justice Frankfurter in *Stroble* v. *California*, 343 U. S. 181, at 202, 203:

> "The question whether or not a confession is coerced involves a complex judgment upon facts inevitably entangled with assumptions and standards which are part and parcel of the ultimate issue of constitutionality * * * moreover items of evidence may be undisputed but not their meaning."

Recognition of this is found in the dissenting opinion by Mr. Justice Frankfurter that the majority opinion is a "conscientious interpretation of the record differing from mine".

The respondent urged in its brief and upon the argument that the conviction should be sustained because of the previous holdings of this Court and urged the Court to follow its rulings in *Lisenba* v. *California*, 314 U. S. 219 and in *Gallegos* v. *Nebraska*, 342 U. S. 55 (see page 50 of respondent's brief). It is respectfully submitted that the instant opinion is in conformity with the prior holdings of the Court.

## ANSWERING THE PETITION OF WISSNER

Respondents submit that the clear holdings of the Court of Appeals of the State of New York in *People* v. *Leyra*, 302 N. Y. 353, 364, demonstrate that that Court reviewing the facts must have held that the submission to the jury

of the voluntariness of the confession as a question of fact was not error and further that that Court reviewing the evidence must have been satisfied that the confession was not coerced. Upon the oral argument in that Court and with all counsel present who are now counsel for the petitioners, the counsel for the respondent was specifically asked by the Court whether we conceded that if the Court of Appeals found the confession to have been coerced the Court must direct a new trial. Counsel answered that we so understood and the oral argument for the respondent proceeded upon that basis.

We submit that petitioner has misinterpreted the Court's language with respect to the necessity of a strong charge disapproving compromise verdicts with the following paragraphs concerning the propriety of the general verdict (21 L. W. 4475). It is the question with respect to the use of confessions as "makeweights in a compromise verdict" which was not raised in the briefs and not asked to be charged in a request by the respondents at the trial. We interpret this opinion as a recognition of the request for the special verdict on the voluntariness of the confession and a statement that the general verdict is customary and constitutional. Again the defendants in New York in a capital case are fully protected by the full review powers of the Court of Appeals.

Petitioner Wissner urges also that only incidentally did he discuss his argument on the alleged unfairness of the New York procedure on confessions. His counsel argues this point before the Court and it takes up four pages in the reply brief of the petitioner's as Point II, submitted to this Court early in January, 1953.

Respondents do not interpret the Court's opinion as holding, as Wissner alleges as his third point, that the use of a coerced confession may be harmless error. The Court specifically has said that "reliance on a coerced confession vitiates a conviction * * * forced confessions will [void

State convictions]". This Court has clearly stated the accepted principle that a confession which is held by the Court or by the highest Appellate Court of a State to have been coerced, must vitiate the conviction, but where the facts and inferences are disputed and the confession, cannot be held as a matter of law to have been coereed, then the submission to the jury of the issue is proper and the quantity of other evidence of guilt clarifies the propriety of the verdict.

This Court has consistently stated that the findings of the State Courts will not prevent them from reviewing the entire record. So also this Court in discussing confessions has considered whether evidence of guilt existed outside of the confession (see *Harris* v. *South Carolina*, 338 U. S. 68 and *Ashcraft* v. *Tenn.*, 322 U. S. 143). In any event the argument that this Court without the confessions could not find constitutionally sufficient evidence to sustain the convictions is fully answered by this Court. "Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse it" (21 L. W. 4479).

A discussion by petitioner Wissner's counsel as to the lack of cross examination of the witnesses against him was argued before (Wissner's brief, pages 14, *et seq.*) and answered (Respondent's brief, pages 50 to 59). The Trial Court very clearly charged the jury as set forth on the cited pages of our original brief that the confessions were not evidence against Wissner. If they are not evidence then they are neither witnesses nor accusers nor depositions nor *ex parte* affidavits used against him, and the claim of the loss of right of confrontation falls with the lack of the basis for the argument.

## THE PETITIONS FOR REHEARING SHOULD BE DENIED

This lengthy opinion followed exhaustive briefing of the cases and full oral argument under the rules of this Court and a period of more than six months, which was obviously devoted to full review of the records, briefs and of the authorities on the questions involved. The opinion so deliberately arrived at should be accepted as the law and a determination of the case. The petitions for leave to reargue should be denied.

Dated, White Plains, N. Y., July 22, 1953.

Respectfully submitted,

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